No. 415.

Sup. Brf. of Binney for Appell

Filed Dec. 7, 1896.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE NEW YORK INDIANS, APPELLANTS,
v.
THE UNITED STATES. } No. 415.

SUPPLEMENTAL BRIEF FOR APPELLEE.

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THE NEW YORK INDIANS, APPELLANTS,)
v.) No. 415.
THE UNITED STATES.)

SUPPLEMENTAL BRIEF FOR APPELLEE.

In the Additional Brief for the Appellants, filed November 28, 1896, certain statements are made which call for notice by appellee's counsel.

(1.)

The Additional Brief asserts that the defense made by the United States, which has been sustained by the Court of Claims, is not warranted by the pleadings. The brief states that—

> The issues of fact presented by the pleadings are made by the petition and the pleas of the United States. These issues are limited by the pleadings to the truth of the allegations set forth in the petition, for the United interposed a general denial only, and did not plead any special matter in controversion or avoidance of the claims set up in the petition. * * *

> It is clear that the United States must be confined to the issues made by the pleadings and can not be heard to allege that some one or all of the several tribes of Indians either abandoned the treaty or had accepted a sum of money in relinquishment of any claim growing thereout. * * *
>
> To avoid what would seem the inevitable liability of the United States in the premises, the court below holds that the claimants in effect abandoned the treaty and consented to forego all claim upon the United States resting thereon. As is above pointed out, the Government is in no position under the pleadings to set up such a defense. (Additional Brief, pp. 3, 4, 16.)

Whether or not, had this suit been brought in another court than the Court of Claims, the appellants could have contended that the defense set up by the United States could not be made, on appeal, under the general issue, it is certain that no such contention can be supported on an appeal from a judgment of the Court of Claims, as it is well established that while the proofs adduced in support of the petition must not wholly depart from the case presented therein (*Baird* v. *United States*, 8 C. Cls. R., 13), yet neither the common law rules of pleading nor those incident to proceedings in equity are in force in that court. (*Peirce* v. *United States*, 1 C. Cls. R., 195; *Brown* v. *District of Columbia*, 17 *id.*, 303, 310.)

In *Burns* v. *United States* (4 *id.*, 113, 127), the opinion of the court said plainly, "*we have no rules of pleading*," and when the judgment in that case was affirmed on appeal this court took no exception to the statement just quoted, and itself said: "The Court of Claims in deciding upon the rights of claimants is not bound by any

special rules of pleading. (*United States* v. *Burns*, 12 Wall., 246, 254.)

Again, in *Figh* v. *United States* (8 C. Cls. R., 319, 322), the Court of Claims said:

> Constituted as this court is, the rules of technical pleading which might be applied here need not be discussed. It is enough that they have not been relied on by the parties, and if they had, under the repeated rulings of the Supreme Court, it would be our duty to decide the case on the merits, without regard to technical rules.

In *Burke* v. *United States* (13 C. Cls. R., 231, 238), it was said:

> The forms prescribed for [the Court of Claims] are neither taken from the common law nor from equity. They leave a large measure of freedom from the restraints of special rules of pleading. (*Burns's Case*, 12 Wall., 246.)

Under such rulings as the above, special pleas of any sort are, as this court is well aware, very rarely made in the Court of Claims, and only in very exceptional cases, the established custom being that the general traverse covers substantially every defense except counter claim where a judgment is sought to be recovered against the claimant, and *nul tiel corporation*, a counter claim that does not exceed the claimant's demand requiring, apparently, no special plea. (*Wisconsin Central R. R.* v. *United States*, recently decided.)

The reason for this disregard of technicality is readily seen when the practice in the Court of Claims is observed. Each side being required, before a case can be put on the calendar, to file a request for findings, with a reference to

the precise evidence upon which each desired finding is based, together with a brief stating the points of law relied upon, it is impossible that either side should be left in ignorance as to precisely what constitutes the claim or defense of the other side, as the case may be.

The general issue in each case being, therefore, the question of the liability of the United States on account of the matters stated in the petition, the defendant's brief and requests take the place of special pleas, and the question for an appellate court to determine is whether the court below has correctly applied the law to the findings as made, not whether those findings have been previously set out in any formal pleading. The rules of pleading were required in order to enable issues to be made and to prevent surprise. Where, as in the Court of Claims, these ends are attained by other means, the rules of pleading are not needed. *Cessante ratione legis, cessat ipsa lex.*

Even if the general traverse did not have the broad scope that is given to it in the Court of Claims, the objection now made by the appellants would come too late. The facts of the case being presented in the findings as fully as they could possibly be in any pleadings, and no objection to the sufficiency of the pleadings to sustain the findings requested by defendant appearing by the record to have been made in the court below, the judgment of the Court of Claims upon those findings would necessarily have cured any defect or insufficiency in the pleadings. As this court said in *Adam* v. *Norris* (103 U. S., 591, 595):

> This objection [that the issue raised by the pleadings did not cover that upon which the case was

> decided] was not made in the case before the circuit court. The case was submitted to the court, which found all the facts necessary to decide the question of title to the land held by defendants. We think it is too late to raise this technical question after a full hearing and finding by the court of all the facts pertinent to the case. The pleading would be good after verdict. A *multo fortiori*, is it good after this finding, and on appeal, with no attempt to correct it in the court below.

In *Wisconsin Central R. R.* v. *United States* this court recently affirmed the judgment of the Court of Claims in spite of an objection on the ground of insufficient pleadings, not merely because "the record does not disclose that this objection was raised below," but chiefly because "the findings of fact show that the entire matter was before the court for, and received, adjudication." That is precisely the condition in the present case.

(2.)

In seeking to magnify the cession of the Indians' right, title, and interest in the lands at Green Bay into a substantial consideration for the covenants of the United States in the treaty of Buffalo Creek, the Additional Brief says:

> The Court of Claims did not find nor is it true that the United States made a grant of lands in Wisconsin to the New York Indians at any time. The Wisconsin lands were purchased and paid for by the claimants. * * *
>
> Nothing could be further from the truth than the statement in the opinion of the court below that "the United States gave the New York Indians land in Wisconsin for emigration." * * *

> The United States gave nothing to the New York Indians except their approval of a bargain. * * *
>
> It is plain that there is no warrant for the statement of counsel for the United States that the title to the 500,000-acre tract in Wisconsin was acquired by the claimants at the cost of the United States. (Additional Brief, pp. 7, 8, 9, 21.)

In the appellee's brief (p. 20) it is made sufficiently clear that what the United States gave up by "approving the bargain" in 1821 and 1822 was its own right to occupy all land the occupancy of which was transferred by the Menomonees or Winnebagoes to the New York Indians. This relinquishment of its rights by the United States was a gift whose value was in proportion to the value of the cessions by the Menomonees and Winnebagoes, which cessions would have been fruitless without such a gift.

Whatever be thought of the legal effect of those cessions of 1821 and 1822, it is a fact, as shown by the treaties of 1827, 1831, and 1832 (appellee's brief, p. 21), that the Menomonees denied that they had ceded any land whatever to the New York Indians, and also that the United States paid the Menomonees for every foot of land which that tribe ultimately consented to allow the New York Indians to occupy. If the payment of $20,000 to the Menomonees, to secure an undisputed right to the New York Indians to settle on certain lands, was not in effect a free gift to the latter of an interest in those lands, it is hard to see what can ever constitute a gift; and when appellants' counsel say that the Indians' title to the 500,000-acre tract was not acquired at the

cost of the United States (Additional Brief, p. 21), or speak of the substitution of this undisputed right of settlement for the former disputed title in common with the Menomonees (a title which was little more than a right to go on the warpath against the Menomonees) as a "spoliation" (Additional Brief, p. 9), it is hard to see what meaning they attach to the words they use.

Appellants' counsel state (Additional Brief, p. 7–8) that besides the sum (only $5,000, after all) paid by the New York Indians to secure their disputed title, "they paid out large sums for exploring expeditions for the lands purchased by them, and the removal of their people thereto." This does not appear from the findings, which state, on the contrary, that "*the defendants aided* some ten Indians representing plaintiffs in exploring," etc. (Rec., 7), while the special provisions for the Oneidas in New York and the St. Regis (arts. 9 and 13, treaty of Buffalo Creek), taken in connection with Finding XVIII (Rec., 21), show that the United States repaid to those tribes their outlay in connection with the Wisconsin lands, as was also done to the Green Bay Oneidas as to all the land which they did not retain. (Oneida treaty, 7 Stats., 566.) Whatever expense, then, the Indians had been put to in connection with that portion of the Wisconsin land, their interest in which was relinquished by the treaty of Buffalo Creek and the Oneida treaty, appears to have been made good to them by the United States.

(3.)

The Additional Brief states (p. 16):

> The court below found that the claimants did all that was required of them under the treaty, and that the United States got the whole consideration moving it to enter into the treaty.

No citation is made from the record in support of this extraordinary statement, which is utterly irreconcilable with the language used by the court below. As to the latter point, the opinion says expressly:

> In the first place it is to be kept clearly in sight that for the promises contained in the treaty of Buffalo Creek the United States were to receive from the Indians no consideration in money or New York land, and (except in the slight emigration West, above described) have received *no consideration whatever* from the Indians.
>
> The defendants' motive for the treaty was political. They wished the plaintiffs to move West. The plaintiffs have not moved West and defendants have failed in their purpose. (Rec., p. 40.)

Further comment upon this part of the above statement of appellants' counsel is unnecessary, and the statement that "the court below *found* that the claimants did all that was required of them under the treaty" has equally little to support it. The treaty contains the solemn promises of the Senecas, Cayugas, Onondagas residing with the Senecas, Tuscaroras, and New York Oneidas to emigrate, and the court has stated positively that—

> The mass of the Indians wished to remain in New York, or at least evinced no desire to leave it. * * * It can not be doubted that if the plaintiffs

> in this action really wished to avail themselves of the treaty grants, the Washington Government would have heartily aided a westward emigration, thus clearing for settlement by the approaching immigrant the fertile lands of central New York. (Rec., 40, 41.)

If the words just quoted mean anything, they mean that the Indians did not do what they had promised to do, and that the United States was in no way responsible for the failure. To treat this as equivalent to saying that "the Indians did all that was required of them" is but to play with words.

(4.)

The Additional Brief states (p. 12) that—

> The grant to the Indians, although of a legislative or treaty character only, was as effective as though made by deed of the most technical character.

Conceding the truth of this, the question still arises, What was this "grant"? Was it a real grant of lands, or was it merely a setting apart of lands to be granted or not in the future, or to be granted to a greater or less extent in the future, as circumstances should determine? Appellants' counsel can gain nothing by *calling* the transaction a grant, or by saying that it was as effectual under the treaty as it would have been had a deed been made, unless it *really was* a grant. The authorities cited are wholly beside the mark, as they relate to grants made either absolutely, as far as concerned the grantee (*Rutherford* v. *Green's Heirs*, 2 Wheat., 196), or upon conditions the performance of which was waived by the grantor

(*Fremont* v. *United States*, 17 How., 542). The present case is much more analogous to those cited and distinguished in the opinion in the Fremont case, viz, *United States* v. *Boisdoré*, 11 How., 63; *Glenn* v. *United States*, 13 *id.*, 250; *Vilemont's Heirs* v. *United States*, *id.*, 261. In regard to these and similar cases this court has said:

> These grants were almost uniformly made upon condition of settlement, or some other improvement, by which the interest of the colony, it was supposed, would be promoted. But until the survey was made no interest, legal or equitable, passed in the land. The original concession granted on his petition was a naked authority or permission, and nothing more. But when he had incurred the expense and trouble of the survey, under the assurances contained in the concession, he had a just and equitable claim to the land thus marked out by lines, subject to the conditions upon which he had originally asked for the grant. But the examination of the surveyor, the actual survey, and the return of the plat were conditions precedent, and he had no equity against the Government and no just claim to a grant until they were performed, for he had paid nothing and done nothing which gave him a claim upon the conscience and good faith of the Government. * * *
>
> It necessarily happened, from this mode of granting, that many concessions were obtained which the parties never afterwards acted on. * * * They had evidently no claim, therefore, upon the justice or conscience of the Spanish Government. It had not granted them the land and they had done nothing which in equity bound that Government to make them a title. (*Fremont* v. *United States*, 17 How., 542, 554–556.)

So in the present case the land was not granted, but merely set apart to be granted in the future to the tribes who fulfilled their promises of emigration. These promises were not fulfilled, and hence the claimants have done nothing which gave them "a claim upon the conscience and good faith of the Government," "nothing which in equity bound that Government to make them a title."

(5.)

The Additional Brief (p. 13) states that the court below "holds that the New York Indians had a valuable interest in their New York lands, sufficient to furnish consideration for a contract." This may have been the fact, but the court below did not so state. It said nothing whatever about the interest of the Indians in the New York lands being "sufficient to furnish consideration for a contract" (cf. Rec., 32), and for the obvious reason that no interest in the New York lands formed any consideration for the contract of the Indians with the United States. The incorrect statement in the Additional Brief is at best irrelevant, and possibly liable to mislead.

The Additional Brief (p. 13) also quotes the statement of the court below that "the amount and sufficiency of the consideration it is not our part to consider," but fails to call attention to the court's statement a few lines above (Rec., 32), that "*in agreeing to move west of the Mississippi* and to surrender their Wisconsin rights the Indians furnished a sufficient consideration for the contract of 1838." The court stated plainly the double character of the consideration, and although it did not inquire

into the sufficiency of the consideration as a whole, it did inquire into the relative sufficiency of the two parts, and the appellants, for the matter of that, do the same. They analyze the consideration and assert that the surrender of the defeasible Wisconsin title was everything; the promise of emigration, nothing; while the court below practically reaches the reverse conclusion and holds that, the promise of emigration having failed, the United States "have received no consideration whatever from the Indians." (Rec., 40.)

In this connection, it may be well to refer to another extraordinary statement of the Additional Brief (p. 18, l. 2), "that there was no consideration, real or pretended, for the abandonment by the Indians of their claims." Had the United States induced or done anything to induce the Indians to "abandon their claims," the statement might have some relevancy; but since when has it been required, when one party to a contract has failed to perform his promise, that some new consideration should move to him before his claim upon the other party can be said to have ceased to exist, or to have been abandoned?

(6.)

Appellants' counsel lay great stress on what they call "the failure of the United States to take the initiative." They say, "If the initiative in carrying out the purpose of the treaty was on the United States and that initiative was never taken, how is it possible to talk of abandonment?" (Additional Brief, 23.) On page 22 they appear to define this "initiative" as the duty of "prescribing a time for the removal of the claimants and making

provision therefor." If by the duty of "prescribing a time" counsel mean that the President should have fixed a date after which the right of removal would cease to exist, the answer is that the treaty fixed that date (see Appellee's Brief, pp. 36–43, 75–76); but if counsel mean that arrangements should have been made with particular tribes or bands of Indians, fixing particular dates when their removal should take place, the answer is that this was done through Hogeboom in the case of the only band that wished to emigrate, and that when the time came 73 of those who had agreed to go refused.

Similarly, if by the duty of "making provision" for removal counsel mean that Congress should have appropriated $400,000 in one lump, without regard to the number of actual probable emigrants, the answer is that the treaty did not require this (see Appellee's Brief, pp. 74–75); but if counsel mean that Congress should have provided for the removal of all who wished to go, the answer is that this, and more than twice as much as this, was done. Hence "the initiative," as defined by appellants' counsel, was either something purely imaginary and not required by the treaty, or else it has been fully taken.

On page 18 appellants' counsel go so far as to say that the court below has held, "following this court, that the Indians were not called upon to go West until the President should prescribe the time for their going and the Government should make provision therefor, which it is not only conceded but also affirmatively found was never done." Counsel omit to state, however, that the court below held that such was the case only "if we are to be purely technical" (Rec., 35), and that the ultimate

conclusion of the court was the claimants' case could not be aided by any such technicality because, the course pursued by the United States being in accordance with the wishes of the Indians, the latter have not been injured thereby. (See Rec., 42.)

Undoubtedly an "initiative" was on the Government—it was required to provide for the removal of all who wished to go and to appoint either directly or through its emigrating agent a day when the start should be made, both of which things it has done. It was also required to ascertain who wished to go, and this also it has done. To have taken a single Indian from New York against his will would, under this treaty, have been a gross violation of his personal rights, whatever other treaties may have provided in regard to the tribes who were parties to them; and this was doubly true in the case of the largest tribe—the Senecas, whose reacquisition of the title to the Allegany and Cattaraugus reservations in 1842, with full right to remain thereon forever, the United States had approved by solemn treaty.

To avoid violating the rights of the Indians and turning the treaty into an engine of oppression and outrage, it was absolutely necessary to learn how many wished to emigrate, and apparently until 1845 there was no sufficient prospect of an emigration party to warrant the appointment of an agent. When the party that was enrolled for emigration in 1845, or as many of them as finally decided to go, had departed, it was found that no others wished to go except about a dozen, who presumably were among the 17 who ultimately joined Hogeboom's party in the West.

(7.)

The Additional Brief (pp. 25–27) refers not merely to certain acts of Congress which have been sufficiently discussed in appellee's brief (pp. 80–82), but also to subsequent proceedings which never led to the passage of any act or the making of any treaty except the jurisdictional act in the present case. It is submitted that these proceedings are wholly irrelevant, the rights of the parties, whatever they may be, being unaffected by anything that took place after the United States in 1859 and 1860 asserted its title to the lands originally set apart for the Indians in consideration of their promise to remove, but to which they had failed to remove; but if these proceedings had any relevancy whatever, it would only be to show that, in spite of the stubborn and persistent clamor of the Indians to be paid for being allowed to break their promises, Congress has never consented to anything more than to allow the controversy to be judicially determined.

(8.)

The Additional Brief (p. 27) attacks the Senate's proviso as to what should be done with the balance of the land and of the $400,000 in case of a partial failure of emigration. It is first stated that the proviso, "if it had any meaning at all inconsistent with the terms of the treaty as executed, was an attempt to add to the treaty an amendment to which the assent of the claimants was as necessary as that assent was necessary to the treaty itself." This is undoubtedly true, and in fact counsel could well

have gone further, and said that if the proviso added anything whatever to the treaty, even though perfectly consistent therewith, such assent was necessary. The answer to this statement is that such assent was given by every assenting tribe. (See Appellee's Brief, p. 62.)

It is also contended that because the President's proclamation stated that the treaty was "word for word, as follows," therefore "everything tentative in the nature of negotiation or provision in relation to the treaty not to be found in it as proclaimed 'word for word' can have no possible bearing upon the case," so that the proviso "is entitled to no consideration." (Additional Brief, p. 28.) Were this correct, then there could be no possible ground for holding that the Onondagas at Onondaga, Oneidas at Green Bay, Stockbridges, Munsees, and Brothertowns were parties to the treaty, for if the treaty "word for word" be the only document to look to, they certainly were not parties to it, and appellants' counsel are most inconsistent in holding that they were. The court below has held that they were parties because it understands that the Senate resolution of March 25, 1840 (Rec., 18), recognized them as such. Were the matter one of importance, it could easily be shown that the court below was in error as to this (see Appellee's Brief, p. 84), but it is undeniable that the Senate *could* have recognized them as parties had it seen fit to do so, and similarly the Senate could attach any condition to the execution of the treaty, provided only such condition was made known to the Indians, as was done with the proviso in this case.

(9.)

The argument in the Additional Brief (pp. 29–33) as to estoppel only serves to darken counsel. The vital question is, Were the Indians willing to leave their homes in New York and settle in the land set apart for them in the West within the period of five years named in the treaty, or even within any reasonable time thereafter? The Court of Claims has decided, upon all the evidence before it, that they were not willing to do so, and that the United States was justified in recognizing that to be the case and in making no further effort after June, 1846, to induce an emigration. This being so, the purpose for which the land was set apart and the consideration for setting it apart having alike failed, the United States was clearly entitled to consider it as no longer set apart, and to dispose of it in some other way.

CHARLES C. BINNEY,
Assistant Attorney, for Appellee.

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